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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/774,410	02/10/2004	Hermann Stahl	87333.2462	1083

7590 12/14/2005
BAKER & HOSTETLER LLP
Washington Square, Suite 1100
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WASHINGTON, DC 20036

EXAMINER

GABOR, OTILIA

ART UNIT	PAPER NUMBER
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2884

DATE MAILED: 12/14/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/774,410

Applicant(s)

STAHL ET AL.

Examiner

Otilia Gabor

Art Unit

2884

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 10 February 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-12 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-12 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 10 February 2004 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☒ None of:
- 1) ☒ Certified copies of the priority documents have been received.
 - 2) ☐ Certified copies of the priority documents have been received in Application No. _____.
 - 3) ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date 06/08/04.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

DETAILED ACTION

Priority

1. Acknowledgment is made of applicant's claim for foreign priority based on an application filed in Germany on 08/10/2001. It is noted, however, that applicant has not filed a certified copy of the above application as required by 35 U.S.C. 119(b).
2. Acknowledgment is made of applicant's claim for priority under 35 U.S.C. 119(a)-(d) based upon an application filed in Germany on 08/10/2001. A claim for priority under 35 U.S.C. 119(a)-(d) cannot be based on said application, since the United States application was filed more than twelve months thereafter.

Claim Rejections - 35 USC § 102

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

(d) the invention was first patented or caused to be patented, or was the subject of an inventor's certificate, by the applicant or his legal representatives or assigns in a foreign country prior to the date of the application for patent in this country on an application for patent or inventor's certificate filed more than twelve months before the filing of the application in the United States.

4. Claims 1-12 are rejected under 35 U.S.C. 102(d) as being barred by applicant's disclosure of the currently claimed invention in the German Patent DE 10138302.9 filed

08/10/2001, which is more than twelve months from the filing date of the current Application.

The German Patent (as disclosed in the International Publication No. WO 03/014713 A2) discloses the claimed measuring device for determining the concentration of gases by infrared absorption with modulable radiation source, which together with two radiation detectors (a measuring detector and a reference detector) located in the beam path is located in the interior of a sealed housing, wherein at least one permeable window is located in the beam path between the radiation source and the radiation detectors, where the beam path is split into three sections, one section located between the source and a first window, the second section located in between the first and a second permeable window and which forms the measurement section, and a third section which is located between the second permeable window and the radiation detectors, where the housing has stability up to a temperature of 100 degrees Celsius. The measurement section (cuvette) is provided with a heating device. The limitations regarding the window materials and sections of the housing are also disclosed.

5. Claims 1-4, 6-8, 10-12 are rejected under 35 U.S.C. 102(e) as being clearly anticipated by McVey (U. S. Patent 6,875,399).

Regarding claims 1, 2, 4 McVey discloses a measuring device for determining the concentrations of gases by infrared absorption with a modulable radiation source (100) , which together with two radiation detectors (122, 124, 126, 128) that are located in the beam path (104), one of which is a measuring detector and another one a reference detector, is located in the interior of a housing (see Fig.2) which is sealed and

gastight with respect to the gas to be measured, wherein at least one infrared permeable window (112) which closes off the interior housing with respect to the gas is located between the source (100) and the radiation detectors (122, 124, 126, 128), characterized that the beam path between the source and the detector is split into three sections: first section (98) located between the source (100) and the first infrared permeable window (112), the second section (102) which is accessible to the gas and which extends between the first window (112) and a second infrared permeable window (116), and a third section (94) located between the second window (116) and the detectors (122..128). McVey discloses that the housing is made of either aluminum, lead, glass or PTFE all of which are dimensionally stable with respect to temperatures up to at least 100 degrees Celsius (see Fig.2 and corresponding description). McVey also discloses that the measuring system is part of an incubator where the measuring chamber is heated with a heater (82) (see Fig.1 and corresponding description).

Regarding claims 3 and 11 McVey discloses (see Fig.7) that at least one beam splitter (162..166) is located in the beam path of the irradiation source (100), and that the beam splitter and the detectors are located in a separate sealed off detector module (160).

Regarding claim 6 McVey discloses that the measuring section (102) is made of aluminum (see Col.9, lines (29-34)).

Regarding claims 7 McVey discloses that each of the three sections are located in interior spaces of the housing but are themselves sealed in individual housings (se Fig.2).

Regarding claim 8 McVey discloses detection of carbon dioxide.

Regarding claims 10, 12 McVey discloses that the radiation source is located in its own separate module (98) made of aluminum and that it contains a reflector (101) turned away from the measurement section (102). (see Fig.2).

Claim Rejections - 35 USC § 103

6. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

7. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

8. Claims 5, 9 are rejected under 35 U.S.C. 103(a) as being unpatentable over McVey.

Regarding claim 5 McVey fails to disclose that the infrared permeable window is

made of calcium fluoride, however since he fails to limit the type of material used but requires that it be infrared permeable, it would have been obvious to one with ordinary skill in the art to use calcium fluoride as the material, since it is well known that calcium fluoride window are infrared permeable and since it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use (*In re Leshin*, 125 USPQ 416).

Regarding claim 9 McVey fails to specifically limit the size of the different sections, but since he fails to limit the size it would have been obvious to one of ordinary skill in the art to use the claimed length range since it has been held that discovering an optimum value of a result effective variable and/or discovering an optimum or workable range where the general conditions of a claim are disclosed in the prior art, involves only routine skill in the art (*In re Aller*, 105 USPQ 233; *In re Boesch*, 617 F.2d 272, 205 USPQ 215 (CCPA 1980)).

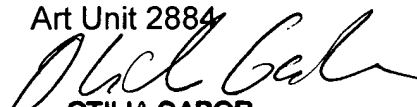
Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Otilia Gabor whose telephone number is 571-272-2435. The examiner can normally be reached on Monday-Friday between 9am-5pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, David Porta can be reached on 571-272-2444. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Otilia Gabor
Primary Examiner
Art Unit 2884



OTILIA GABOR
PRIMARY EXAMINER